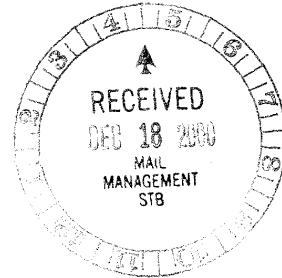


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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582
(Sub-No. 1)

MAJOR RAIL CONSOLIDATION
PROCEDURES



AMTRAK'S REPLY COMMENTS IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING

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The National Railroad Passenger Corporation ("Amtrak") submits the following reply comments in response to the opening comments submitted by other parties on the proposed modifications to the Board's regulations at 49 C.F.R. part 1180, subpart A, governing proposals for major rail consolidations.

I. RAIL MERGER POLICY STATEMENT

Amtrak strongly endorses NS's suggestion (NS Comments at 37) that the proposed rail merger policy statement (proposed Section 1180.1(a)) should be amended to make it clear that impacts on rail service, and not just impacts on competition, will be of primary importance when the Board reviews future merger proposals. As Amtrak and many other parties have emphasized throughout this proceeding, the effect of future mergers on rail service must be a primary consideration in determining whether such mergers are in the public interest.

II. SERVICE ASSURANCE PLANS

A number of parties representing a broad range of interests – Class I railroads, commuter authorities, government agencies, and shippers – have asked the Board to clarify or modify its proposed regulations governing service assurance plans (SAPs) in ways that echo or are consistent with Amtrak's prior comments regarding SAPs:

1. Amtrak agrees with the many parties¹ who have urged the Board to specifically require applicants to consult with passenger railroads that operate over their lines in connection with the development of SAPs.

¹ DOT Comments at 19; Oklahoma DOT Comments at 12; Maryland Mass Transit Administration/SCRRRA Comments at 9-10; METRA Comments at 4.

Participation by passenger railroads in the SAP process is clearly essential if SAPs are to fulfill their intended purpose of ensuring that future mergers will not harm passenger rail service.

2. Procter & Gamble ("P&G") has urged the Board to clarify proposed Section 1180.10(c), which addresses SAP requirements regarding yard and terminal operations, to make it clear that applicants must provide plans for yard consolidations and for capital improvements to existing yards. P&G has also asked the Board to require applicants to provide figures for average yard inventory for a one-year pre-transaction period. (P&G Comments at 7.) As Amtrak has previously noted, many of the delays that Amtrak trains have experienced during the implementation of recent rail mergers have been caused by freight yard congestion that has spilled over onto adjacent main line tracks on which Amtrak's trains operate.² P&G's recommendations would help ensure that yard- and terminal-related capacity and operational problems are identified and addressed before they occur, and would facilitate the Board's monitoring of changes in yard traffic volumes that may be harbingers of service problems.

3. Several Class I railroads have asked the Board to confirm that SAPs are intended to be flexible in nature, and that applicants will not be

² Amtrak's Comments on Advance Notice of Proposed Rulemaking ("ANOPR") at 3. See also CSX Comments at 53, n. 30 (describing the unanticipated congestion problems that CSX experienced during the implementation of the Conrail acquisition at its rail yard at Willard, Ohio; congestion at that yard caused major delays to Amtrak's New York-to-Chicago "Three Rivers" train).

required to rigidly adhere to plans identified in SAPs where real world conditions require different approaches. (See, e.g., KCS Comments at 33-34; CSX Comments at 51-57.) Amtrak strongly agrees. As Amtrak stated in its comments on the ANOPR (at 7):

Given the nature of railroad operations and the long "lead time" between the filing of a merger application and merger implementation, the [SAP] should not be viewed as an inflexible document. To the contrary, applicants should be encouraged to modify their plans, and to update their [SAPs] as appropriate, to reflect changed circumstances and experience gained through the merger process. Revisions to [SAPs] should be submitted to the Board and made publicly available.

Allowing railroads to modify the plans set forth in their SAPs, but requiring them to give notice of such modifications, will give applicants the flexibility they need to successfully implement their merger. At the same time, it will enable the Board to ensure that applicants meet the commitments in their SAPs, even if not in precisely the manner that was initially contemplated, and will also put other parties on notice of changes in applicants' plans that may affect them or to which they may take exception. Amtrak urges the Board to incorporate this approach in its final rule.

4. Several railroad parties have commented on the importance of developing and applying reliable "benchmarks" to measure applicants' pre- and post-merger performance. (BNSF Comments at 51; UP Comments at 9.) Amtrak agrees with these comments. They underscore the need for the Board to specifically require, in proposed Section

1180.10(b), that SAPs include “benchmark” and projected performance measurements for passenger rail services. See Amtrak’s Comments at 6-7. In the interest of ensuring that the most relevant data are used for benchmarking purposes, applicants should, as a number of railroad parties have suggested,³ be directed to use data from the most recent 12-month period for which reliable data are available, rather than for the most recent calendar year.

5. Finally, Amtrak agrees with the Oklahoma Department of Transportation (Oklahoma DOT Comments at 12) that, for purposes of consistency with proposed Section 1180.10, the summary description of that section’s SAP requirements that appears in proposed Section 1180.1(h)(1) should be revised to specify that SAPs must detail how shippers, connecting railroads and passenger railroads will be affected and benefited by the proposed transaction.

Proposed section 1180.10(b), “Coordination of Freight and Passenger Operations”, requires applicants to “describe definitively” how their proposed transaction will impact passenger rail services operated over the applicants’ lines. Several commuter railroads have urged the Board to impose a similar requirement with respect to freight services of applicants that are operated over trackage owned by passenger railroads.⁴ One party has also suggested that

³ CP Comments at 5; NS Comments at 46.

⁴ NJT Comments at 9, New York State Comments at 11; Maryland Mass Transit Administration/ SCRRRA Comments at 10-11.

applicants be required to obtain the approval of the affected passenger railroad before increasing freight traffic over the passenger railroad's lines.⁵

Amtrak does not feel that such requirements are necessary with respect to freight railroad operations over Amtrak-owned trackage, such as the New York-to-Washington portion of the Northeast Corridor.⁶ The agreements between Amtrak and the freight railroads that operate over Amtrak-owned lines require that any proposed changes in freight operations be submitted to Amtrak for its approval, and provide for arbitration if a freight railroad believes that Amtrak's approval has been unreasonably withheld. In addition, during the course of the Conrail acquisition proceeding, Amtrak entered into a separate agreement with NS and CSX that established principles applicable to acquisition-related changes in freight operations on Amtrak-owned lines.⁷ As NS advised the Board in its first annual oversight report, the dialogue established by these agreements for addressing merger-related changes in freight operations on Amtrak's Northeast Corridor has worked very well.⁸

⁵ American Public Transportation Association's Comments at 5.

⁶ Amtrak recognizes that commuter railroads may be in a very different situation. Among other things, commuter railroads' agreements with the freight railroads that operate over their lines may give them less ability than Amtrak has to prevent changes in freight operations that could harm passenger services.

⁷ STB Finance Docket No. 33388, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corp. ("Conrail Acquisition"), Decision No. 89, served July 23, 1998, at 95.

⁸ Conrail Acquisition (Sub-No. 91), First General Oversight Report of Norfolk Southern Corp. and Norfolk Southern Ry., filed June 1, 2000, at 19.

III. ESSENTIAL SERVICES

Proposed section 1180.1(c)(2)(ii) states that, in approving mergers, “[t]he Board must ensure that essential freight, passenger and commuter rail services are preserved.” A number of commuter rail parties and state agencies have urged the Board to confirm that it will deem any passenger service supported by governmental funding to be an essential service.⁹ They point out that the Board does not generally regulate passenger railroad operations, and therefore would not be well equipped to second guess the determinations of government entities funding such services that their continuation is essential.

Amtrak agrees with this position,¹⁰ and believes that it is shared by the Board. In the Conrail acquisition proceeding, the Board imposed a trackage rights condition requested by the New England Central Railroad (“NECR”) even though it found that NECR had not shown that it would suffer the type of merger-related harm that would warrant the imposition of conditions absent harm to essential services. The Board took this action because it believed that the Conrail acquisition would, by reducing NECR’s revenues, impair its ability to provide “important services” to Amtrak, which operates the state-supported “Vermont” service over NECR’s line.¹¹ In a subsequent decision, the Board emphasized that it would “be prepared to alter the original condition if it is not

⁹ APTA Comments at 3-4; MD Mass Transit Administration/SCRRA Comments at 11-14; NJT Comments at 6-8; Amalgamated Transit Union (“ATU”) Comments at 2; Oregon DOT Comments at 4.

¹⁰ Amtrak also agrees with Oklahoma Department of Transportation (Oklahoma DOT Comments at 12) that “harm” to essential passenger services warranting the imposition of conditions is not limited to harm of such magnitude as would cause a discontinuance of service.

¹¹ Conrail Acquisition, Decision No. 89, served July 23, 1998, at 104-05.

working as intended to preserve the important services" provided by Amtrak's "Vermonters".¹²

IV. PROCEDURAL SCHEDULES AND DISCOVERY

BNSF calls for the Board to significantly limit its review of future mergers by adopting a shortened procedural schedule and prohibiting all discovery. (BNSF Comments at 20.) Such proposals might make sense to someone who had spent the last five years marooned on Gilligan's Island. But to those who have lived through the service crises that have followed recent rail mergers, BNSF's assertion that rail mergers require no greater scrutiny than mergers in other industries makes no sense at all.

Indeed, the differences between rail mergers and other mergers are readily apparent to BNSF's experts. As Professor Pierce explains, railroad mergers are "unique" because of the "service issues" that they raise.¹³ The most cogent argument against BNSF's proposal comes from Professors Gomez-Ibanez and Kalt:

[The] difference between the railroads and most other industries is that harm to competition is not the only major potential public cost of mergers. In particular, railroads connect with one another and exchange traffic, so that service disruptions caused by the merger of two carriers can affect other carriers in the industry. The merging carriers may not consider the costs of the disruptions caused on parts of the rail network, so the Board has a legitimate role in protecting third parties from this harm.¹⁴

¹² Conrail Acquisition, Decision No. 100, served Nov. 6, 1998, at 4.

¹³ BNSFComments, Verified Statement of Richard J. Pierce, Jr. at 11-12.

¹⁴ BNSF Comments, Verified Statement of Jose A. Gomez-Ibanez and Joseph P. Kalt ("Gomez-Ibanez/Kalt V.S."), at 7.

Complex mergers in other industries do not always receive the expedited review that BNSF claims is the norm.¹⁵ But even if they did, the railroad industry is different, and BNSF's proposals would thwart the Board's intent to minimize service disruptions in connection with future rail mergers. The Board should therefore reject them.

V. MERGER IMPLEMENTATION AND OVERSIGHT

Amtrak strongly agrees with two of the comments that DOT has made with respect to merger implementation.

First, DOT has urged the Board to utilize the requirement in proposed Section 1180.10(j) that applicants submit a detailed merger implementation "timeline" as a vehicle for ensuring the "staged implementation" of all future mergers. (DOT Comments at 11-12.) While the division of Conrail may have presented a unique situation in which staged implementation was not possible, Amtrak expects that the Board would not approve a future merger application without ensuring that it would be implemented in a series of carefully staged steps.

Second, DOT has urged that any service guarantees or monetary remedies for merger-related service problems offered to shippers be made

¹⁵ Last week, the FTC decided not to challenge the Time Warner-AOL merger after an investigation that consumed nearly a full year. However, the proposed merger is still being reviewed by the FCC, which is not expected to render a decision until next year. See Angwin, J., "FTC Approves AOL-Time Warner Deal," *Wall Street Journal*, Dec. 15, 2000, p. B8. As for BNSF's proposal to prohibit discovery, any merger applicant who has been forced to respond to a "second request" issued by the Department of Justice or the FTC in a non-rail merger investigation would much prefer the more limited and focused discovery that occurs in STB rail merger proceedings.

equally available to Amtrak and commuter rail operators. (DOT Comments at 19.) As Amtrak has pointed out (Amtrak's Reply Comments on ANOPR at 2-3), such parity is essential to ensure that the Board does not unwittingly create incentives for railroads to disregard their contractual and statutory obligations to give Amtrak trains priority over freight transportation. See 49 U.S.C. 24308(c).

With respect to merger oversight, Amtrak does not agree with BNSF's suggestion that the Board should limit its right to impose additional conditions to address "unforeseen circumstances" that become apparent during merger implementation. Contrary to the implication in BNSF's discussion of this issue (BNSF Comments at 46), the Board's reservation of this right in the proposed regulations merely codifies the practice that the Board has followed in approving recent rail mergers. The language in the proposed regulations to which BNSF takes exception is taken, nearly verbatim, from the Board's decision approving the Conrail acquisition.¹⁶

Indeed, during the oversight period following the implementation of the UP/SP merger, BNSF itself sought far reaching trackage right and other conditions to remedy service problems that had occurred on UP lines in the Houston/Gulf Coast Area over which BNSF had trackage rights. While the Board rejected nearly all of BNSF's proposals, it conditioned its rejection on UP's

¹⁶ Compare proposed Section 1180.1(g) ("During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction.") with Conrail Acquisition, Decision No. 89, served July 20, 1998, at 160 ("we are retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary to address unforeseen harms caused by the transaction").

agreement to fund \$1.4 billion in capacity enhancing infrastructure improvements if BNSF's proposals were not adopted.¹⁷

In addition to this recent experience, there are sound policy reasons for the Board to continue to reserve the right to impose additional infrastructure and other conditions on mergers to address unanticipated service problems. As BNSF's Professors Gomez-Ibanez and Kalt point out, the Board has a "legitimate role" in overseeing how merging railroads address such problems because those railroads have no incentive to remedy harms to "other carriers in the industry."¹⁸ A railroad that has underestimated how much additional capacity it will need to accommodate post-merger operations has no incentive to prioritize capital improvements in a way that minimizes the impact of its own mistake on passenger services and competing railroads that have trackage rights over its lines. To the contrary, the capacity-strapped railroad would undoubtedly (and understandably) prefer that such third party operations disappear!

VI. LABOR PROTECTION

The Amalgamated Transit Union has suggested that the Board extend labor protection rights to employees of passenger railroads. (ATU Comments at 2.) The Board has no authority to do so.

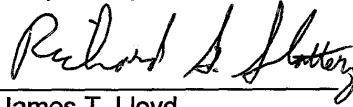
¹⁷ See STB Finance Docket No. 32760 (Sub-No. 26), Union Pacific Corp, Union Pacific R.R., and Missouri Pacific R.R. -- Control and Merger -- Southern Pacific R.R., Southern Pacific Transportation Corp., St. Louis Southwestern Ry., SPCSL Corp., and Denver & Rio Grande Western Ry. (Houston/Gulf Coast Oversight), Decision No. 10, served Dec. 21, 1998, at 20, 27-29.

¹⁸ BNSF Comments, Ibanez-Gomez/Kalt VS at 7.

CONCLUSION

For the reasons stated above, the Board should adopt the revisions to its proposed regulations that Amtrak has endorsed. The Board should reject the proposed revisions to which Amtrak has taken exception because they would inhibit careful scrutiny of future merger applications and place limits on the Board's power to impose conditions to remedy unforeseen harms to rail service.

Respectfully submitted,




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Dated: December 18, 2000

CERTIFICATE OF SERVICE

I certify that I have, this 18th day of December 2000, served copies of the foregoing Amtrak's Reply Comments in Response to Notice of Proposed Rulemaking by first class mail, postage prepaid, upon all parties of record in this proceeding.


Richard G. Slattery